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BSG-AML

DJ No. 90-11-3-1620/2

October 29, 2001

VIA FEDERAL EXPRESS

Clerk's Office

United States District Court for the Southern District of Ohio

Rm. 324

Potter Stewart Courthouse

100 E. 5th St.

Cincinnati, OH 45202

Re: Dow Chemical, et al. v. Acme Wrecking et al.
Dow Chemical, et al. v. Sun Oil Co., et al.
United States v. Aeronca, Inc. et al.
Consolidated Civil Action Nos. C-1-97-0307; C-1-97-0308; C-1-01-439

Dear Clerk:

Enclosed for filing please find the original and two copies of a **JOINT MOTION OF THE UNITED STATES, THE CONTRIBUTION PLAINTIFFS, DEFENDANTS AERONCA AND DEFENDANT THE DICK CLARKE ENTITIES FOR ENTRY OF A FIRST CASE MANAGEMENT ORDER**. Please return one file-stamped copy in the enclosed self-addressed envelope.

Thank you for your prompt attention to this matter.

Sincerely,

Annette M. Lang

Trial Attorney

cc: Mike O'Callaghan
David Northrop
Jonathon Conte
Gary Franke
John Phillips
Craig Melodia
Karl Bourdeau

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION**

THE DOW CHEMICAL CO., et al.,

Plaintiffs,

v.

ACME WRECKING CO., INC., et al.,

Defendants.

Civil Action Nos.

C-1-97-0307; C-1-97-0308

(Consolidated Actions)

C-1-01-439

(Transferred Action)

THE DOW CHEMICAL CO., et al.

Plaintiffs,

v.

SUN OIL COMPANY, d/b/a SUNOCO
OIL CORP., et al.,

Defendants.

Judge Weber

UNITED STATES OF AMERICA,

Plaintiff,

v.

AERONCA, INC., et al.

Defendants.

**JOINT MOTION OF THE UNITED STATES, THE CONTRIBUTION PLAINTIFFS,
DEFENDANTS AERONCA AND DEFENDANT THE RICHARD CLARKE ENTITIES FOR
ENTRY OF A FIRST CASE MANAGEMENT ORDER**

The United States of America, the Contribution Plaintiffs, Defendant Aeronca, Inc. ("Aeronca") and Defendant the Richard Clarke Entities (collectively, "Moving Parties") hereby move this Court for entry of the First Case Management Order that is attached hereto. As grounds therefore, the Moving Parties state:

1. The parties that are still active in this litigation are the United States of America, the Contribution Plaintiffs^{1/}, Defendant Aeronca, Defendant the Richard Clarke Entities^{2/}, Defendant Whitton Container Co. ("Whitton"), and Defendant the Martin Clarke Entities.^{3/}

2. On October 22, 2001, undersigned counsel for the United States provided a draft of a proposed First Case Management Order to counsel for all parties still active in this litigation.

3. On October 24, 2001, counsel for all parties still active in this litigation engaged in a telephone conference call to discussed the draft proposed First Case Management Order that undersigned counsel for the United States had circulated. The parties discussed and agreed upon a number of revisions to the proposed Case Management Order. All counsel were informed that

^{1/} "Contribution Plaintiffs" are the Dow Chemical Company ("Dow"), Ford Motor Company ("Ford"), Anchor Hocking Corporation ("Anchor Hocking"), General Motors Corp. ("General Motors"), King Wrecking Company, Inc. ("King Wrecking"), and OXY USA Inc. ("OXY USA"). The Contribution Plaintiffs are, or are seeking to be realigned as, plaintiffs in the Dow Chemical Actions (C-1-97-0307 and C-1-07-0308).

^{2/} "The Richard Clarke Entities" are Clarke, Inc., Clarke Services, Inc., Richard M. Clarke, as well as some of the Contribution Defendants identified on the attached, proposed Case Management Order.

^{3/} "The Martin Clarke Entities" are Clarke Container, Inc. and Clarke's Incinerators, Inc., as well as some of the Contribution Defendants identified on the attached, proposed Case Management Order.

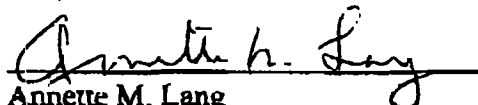
in addition to these revisions, some information that was left blank in the October 22, 2001 draft still had to be filled in.

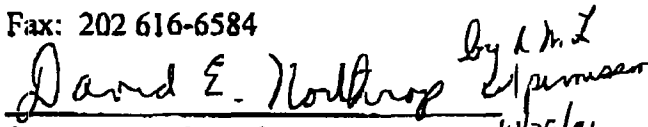
4. On October 24, 2001, by telecopy and electronic mail, undersigned counsel for the United States indicated that a final version of the proposed Case Management Order would be provided to all counsel on October 26, 2001. Undersigned counsel provided the final version -- attached hereto -- at the time indicated. Undersigned counsel requested that all counsel authorize her to sign this final version by no later than COB on October 29, 2001.

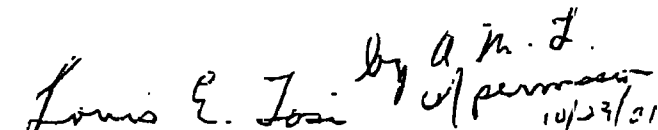
5. Undersigned counsel received final authorization to sign the proposed Case Management Order from all parties except Defendant Whitton and Defendant the Martin Clarke Entities.

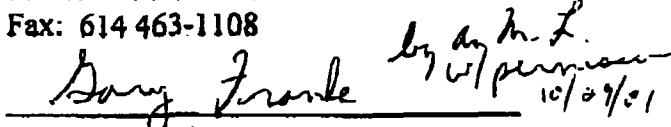
WHEREFORE, the Moving Parties hereby request this Court to enter the attached proposed First Case Management Order.

Respectfully Submitted,


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CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of October 2001, I caused a true copy of the foregoing **JOINT MOTION OF THE UNITED STATES, THE CONTRIBUTION PLAINTIFFS, DEFENDANTS AERONCA AND DEFENDANT THE DICK CLARKE ENTITIES FOR ENTRY OF A FIRST CASE MANAGEMENT ORDER** to be served by first-class mail, postage prepaid upon the following counsel of record:

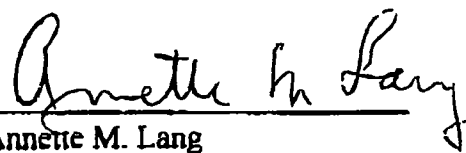
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Annette M. Lang

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION**

_____)	
THE DOW CHEMICAL CO., <u>et al.</u>)	
)	
Plaintiffs,)	
)	
v.)	Civil Action Nos.
)	C-1-97-0307; C-1-97-0308
ACME WRECKING CO., INC., <u>et al.</u>)	(Consolidated Actions)
)	
Defendants.)	C-1-01-439
_____)	(Transferred Action)
)	
THE DOW CHEMICAL CO., <u>et al.</u>)	Judge Weber
)	
Plaintiffs,)	
)	
v.)	
)	
SUN OIL COMPANY, d/b/a SUNOCO)	
OIL CORP., <u>et al.</u>)	
)	
Defendants.)	
_____)	
)	
UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.)	
)	
AERONCA, INC., <u>et al.</u>)	
)	
Defendants.)	
_____)	

FIRST CASE MANAGEMENT ORDER

In order to promote the orderly and efficient conduct of this case, and in accordance with Rules 16(b) and 26(f) of the Federal Rules of Civil Procedure, and Local Rule 16.2, all parties to this action hereby submit this first Case Management Order.

I. PARTIES INVOLVED.

A. United States. The United States of America ("United States") is the plaintiff in the cost recovery action (C-1-01-439) under Section 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") filed against the entities listed as "107(a) Cost Recovery Defendants" below.

B. Contribution Plaintiffs. "Contribution Plaintiffs" are the Dow Chemical Company ("Dow"), Ford Motor Company ("Ford"), Anchor Hocking Corporation ("Anchor Hocking"), General Motors Corp. ("General Motors"), King Wrecking Company, Inc. ("King Wrecking"), and OXY USA Inc. ("OXY USA").¹ The contribution plaintiffs are, or are seeking to be realigned as, plaintiffs in the Dow Chemical Actions (C-1-97-0307 and C-1-07-0308). The Dow Chemical Actions involve CERCLA contribution claims filed against the entities listed as "Contribution Defendants" below.

¹ Dow and Ford are original plaintiffs in Dow Chemical v. Acme Wrecking, et al. and Dow Chemical v. Sun Oil Co. et al. (collectively "Dow Chemical Actions"). Anchor Hocking, General Motors, King Wrecking, and OXY USA Inc. were all defendants in Dow Chemical v. Acme Wrecking, et al. All of the claims of the original plaintiffs in Dow Chemical v. Acme Wrecking et al. were dismissed with prejudice pursuant to this Court's Order of September 10, 2001. Dow, Ford, Anchor Hocking, General Motors, King Wrecking and OXY USA have filed a motion for leave to file a second amended complaint in this matter. The motion seeks to realign Anchor Hocking, General Motors, King Wrecking, and OXY USA as plaintiffs. For that reason, Anchor Hocking, Dow, Ford, General Motors, King Wrecking, and OXY USA will be referred to as the "Contribution Plaintiffs."

C. 107(a) Cost Recovery Defendants. The 107(a) Cost Recovery Defendants are:

(i) Aeronca, Inc. ("Aeronca"); (ii) Clarke Container, Inc. and Clarke's Incinerators, Inc. (collectively, "the Martin Clarke entities"); (iii) Whitton Container, Inc. ("Whitton"); and (iv) Clarke, Inc., Clarke Services, Inc., Richard M. Clarke (collectively, "the Richard Clarke entities").²

D. Contribution Defendants. The Contribution Defendants are: Aeronca, Clarke, Inc., Clarke's Complete Collection, Clarke Container, Inc., Clarke's Incinerators, Inc., Clarke Sanitary Landfill, Clarke Services, Inc., Dick Clarke Trash Removal and Demolition, Martin E. Clarke (individually), Richard M. Clarke (individually), and Whitton Container, Inc. (fka John J. Whitton Trucking).³

E. Defendants. The term "Defendants" shall mean the 107(a) Cost Recovery Defendants and the Contribution Defendants.

II. TRIFURCATION OF ACTION.

The proceedings concerning the claims in this action shall proceed in three phases:

Phase I – Liability; Phase II – Response Costs; Phase III – Contribution Allocation.

² Acme Wrecking Co. Inc., David Hirschberg Co., Sealy, Inc. and Sealy Mattress Co. will be named as defendants in a Second Amended Complaint that the United States plans to file during the week of October 29, 2001. However, simultaneously with filing the Complaint, the United States will lodge a settlement agreement -- in the form of a Consent Decree -- with these entities. Thus, barring unforeseen circumstances, these entities will not be involved in any future litigation, and thus, are not considered parties for purposes of this Order.

³ Clarke, Inc., Martin E. Clarke (individually), and Richard M. Clarke (individually) were not named in the original Dow Chemical action complaints; the Contribution Plaintiffs are seeking to add them in a Second Amended Complaint.

A. Phase I proceedings shall relate to all issues of liability, including affirmative defenses to liability, with respect to the United States' CERCLA 107(a) claim and with respect to Contribution Plaintiffs' CERCLA contribution claims. Phase I proceedings shall consist of all pretrial discovery, motions, evidentiary hearings, trial, and all orders relating to liability.

B. Phase II proceedings shall relate to all issues of the response costs incurred by the United States and the Skinner Landfill Site Group involving the Skinner Landfill Superfund Site. Phase II proceedings shall consist of all pretrial discovery, motions, evidentiary hearings, trial, and all orders relating to response costs.

C. Phase III proceedings shall relate to allocation of costs among the Defendants, including the fair share liability of the Defendants for the response costs incurred by the Contribution Plaintiffs. Phase III proceedings shall consist of all pretrial discovery, motions, evidentiary hearings, trial, and all orders relating to contribution allocation.

III. FORM OF DISCOVERY AND LIMITATIONS ON DISCOVERY.

A. Interrogatories, Requests for Admissions, and Requests for Production of Documents.

1. Limitation on Number. There shall initially be no limit on the number of interrogatories, requests for admissions, and requests for production of documents. The parties, however, may request that this Court limit the number of these forms of discovery if, at any time, the party receiving the requests believes that the number is unduly burdensome.

2. Time for Response. The parties initially shall have 45 days from the date of the receipt of interrogatories, requests for admissions, and requests for production of documents in which to serve a response. Nothing herein shall be construed to

prevent the parties from agreeing between themselves to extensions of time, as necessary.

B. Depositions. The parties shall communicate in advance of the scheduling of any deposition in order to try to schedule the deposition at a time and place mutually acceptable to the witnesses and the parties. Deposition notices shall be received by the opposing party at least five (5) business days prior to the date of the deposition, except upon the agreement of the parties.

C. Initial Disclosure. By stipulation of the parties, the parties shall not be required to produce initial disclosures pursuant to Fed. R. Civ. P. 26(a)(1).

IV. DISCOVERY SCHEDULE.

A. Deferral of Phase II and Phase III Proceedings. The parties shall defer all discovery and all proceedings relating to Phases II and III until: (i) all Phase I issues are resolved, either by summary judgment or trial, and (ii) the Court approves a Supplemental Discovery Plan relating to such discovery.

B. Phase I Discovery Schedule. The discovery schedule for Phase I proceedings is:

Initiation of written fact discovery (RFAs, Interrogatories, Requests to Produce)	The earlier of the date of approval of the CMO or November 8, 2001
Initiation of fact depositions	March 1, 2002
Completion of fact discovery (all methods of discovery must be served so that the date by which the adverse party must respond falls on or before the date set forth herein)	August 2, 2002

Disclosure of all parties' primary experts September 6, 2002
(See Fed. R. Civ. P. 26(a)(2)(B) which, inter alia, requires that a written report prepared and signed by the witness must be included in the initial disclosure)

Completion of depositions of all parties' primary experts October 26, 2002

Disclosure of rebuttal experts November 15, 2002
(See Fed. R. Civ. P. 26(a)(2)(C) which, inter alia, requires that a written report prepared and signed by the witness must be included in the initial disclosure)

Completion of depositions of rebuttal experts December 13, 2002
and all forms of expert discovery

Deadline for service of dispositive motions February 7, 2003

C. Extensions. Any application for an extension of the foregoing deadlines must be in writing and served on counsel for each party having an interest in the extension. Any such application must disclose: (1) the precise relief sought; (2) good cause for such extension; (3) a statement regarding the position of counsel for other parties regarding the application; and (4) a statement that counsel have conferred in good faith in an attempt to agree on an extension.

V. OTHER MATTERS

A. Service by Telecopy or Electronic Mail. As a matter of courtesy, the parties agree to send by telecopy or electronic mail any document required by rule to be served on that party. The document shall be telecopied or "e-mailed" as soon as practical but no later than two days after the date specified in the Certificate of Service to that document. If the document includes attachments or exhibits that, because of length or size or other factors, cannot be telecopied or e-mailed, then the parties shall mutually agree upon a method of transmitting the attachments or exhibits to the opposing party that will assure as timely a receipt as possible of the document by

the opposing party. Nothing in this paragraph shall be deemed to alter or expand the requirements for service provided in the Federal Rules and the date of service shall be as provided in those rules notwithstanding the date of delivery pursuant to this paragraph.

B. Timing of Service of Motions and Briefs – Modification to Local Rule 7.2(a)(2). An adverse party shall have thirty (30) days after the filing of a motion to dismiss, for summary judgment, for judgment on the pleadings, for a more definite statement, or to strike in which to file a memorandum in opposition. The moving party shall have fifteen (15) days after the filing of the memorandum in opposition in which to file a reply memorandum.

C. Length of Initial Memorandum and Opposing Memorandum on Motions for Summary Judgment -- Modification to Local Rule 7.2(a)(3). Except as otherwise permitted by the Court, initial memorandum and opposing memorandum on motions for summary judgment shall not exceed fifty (50) pages in length. Reply memorandum on motions for summary judgment shall not exceed twenty (20) pages in length.

D. Discovery Disputes. The parties shall confer and make good faith efforts to resolve any discovery disputes informally before seeking the Court's involvement. If any discovery dispute cannot be resolved informally by the parties, the parties will consider whether it can appropriately be submitted to the Magistrate for expedited ruling by way of telephone conference/hearing.

E. Retention of Records. All parties shall preserve all records in their possession that are material to this litigation until the conclusion of this litigation or until otherwise ordered by this Court.

F. Binding Effect of this Order. This case management order shall be binding on any new parties joined in this proceeding after the entry of this Order. A copy of this case management order and the complaints, as amended, shall be served on each new party by the party causing such new party to be joined in these proceedings.

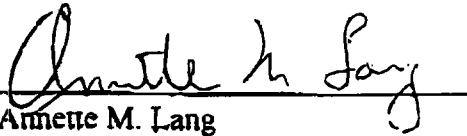
G. Filing of Cross-Claims. Each Defendant is deemed to have cross-claimed against each other Defendant under 42 U.S.C. § 9613(f)(1) and each Defendant is deemed to have denied the allegations in the cross-claims.

I. Incorporation by Reference. With respect to a proposed Second Amended Complaint that the United States provided to each Defendant by electronic mail or telecopy on October 18, 2001, each Defendant, except Whitton Container, Inc., hereby incorporates by reference its answer(s) and affirmative defenses to the United States' Complaint and First Amended Complaint.

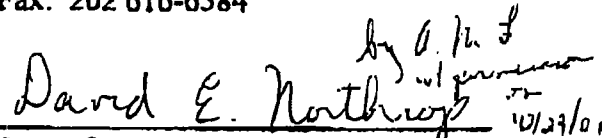
IT IS SO STIPULATED AND SO ORDERED.

United States District Judge

IT IS SO STIPULATED AND AGREED TO BY THE PARTIES:

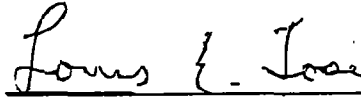


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 *by A. M. L. w/ permission on 10/29/01*

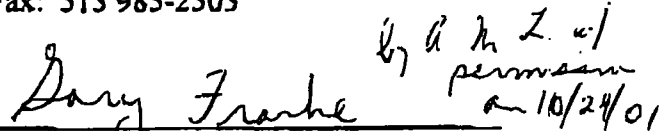
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 *by A. M. L. w/ permission on 10/24/01*

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